

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JERMAINE MOYE,	§	
	§	No. 274, 2009
Defendant Below,	§	
Appellant,	§	
	§	Court Below: Superior Court
v.	§	of the State of Delaware,
	§	in and for New Castle County
STATE OF DELAWARE,	§	
	§	Cr. No. 0806008417
Plaintiff Below,	§	
Appellee.	§	

Submitted: October 21, 2009

Decided: January 20, 2010

Before **HOLLAND, BERGER** and **JACOBS**, Justices.

ORDER

This 20th day of January 2010, on consideration of the briefs of the parties, it appears to the Court that:

1) Jermaine Moye appeals from his convictions, following a jury trial, of three counts of second degree assault.¹ He argues that there was insufficient evidence to establish the “physical injury” element of assault, and that the trial court committed plain error by instructing the jury on a “choice of evils” justification instead of a “self-defense” justification. We conclude that the trial court correctly denied Moye’s motion

¹Moye does not appeal his resisting arrest conviction.

for acquittal because there was sufficient evidence of physical injury. The trial court's jury instruction, however, was incorrect and prevented Moyer from receiving a fair trial with respect to one of the assault charges. As a result, two of Moyer's assault convictions are affirmed and one is reversed.

2) On June 6, 2008, Moyer boarded a DART bus in Wilmington, Delaware, and went to find a seat. The bus driver, Derrick Stevens, called out to him, telling Moyer that he had not paid the fare. Moyer returned to the front of the bus and punched Stevens in the mouth. Moyer then went back to his seat. Stevens called dispatch and told them he had been assaulted. Moyer again walked up to the bus driver and started punching Stevens in the head. Stevens blocked the punch with his shoulder and the two men exchanged blows. Moyer described the incident differently. He testified that he and Stevens got into an argument and that Stevens attacked him. Moyer claimed that he fought back in self-defense.

3) Wilmington Police Officer Paul Simonds was one of the first to arrive at the scene. He saw Stevens holding Moyer in a bear hug. Simonds and another officer ordered Moyer to put his hands behind his back, but Moyer did not respond. Several officers "tussled" with Moyer, and eventually they handcuffed him. Because Moyer had blood in his mouth and some scratches on his face, the officers took him to the Wilmington Hospital. At the hospital, Moyer spat blood in the face of Pamela Kelso,

the nurse who was treating him. Moye also kicked Kelso in her arm. Simonds and his partner tried to control the situation by placing a plastic guard on Moye's mouth. While doing that, Moye bit Simonds in the arm.

4) Moye was charged with three counts of second degree assault, based on his altercations with Stevens, Kelso, and Simonds. A person is guilty of second degree assault when he intentionally causes "physical injury" to the victim.² The term "physical injury" is defined as "impairment of physical condition or substantial pain."³ This Court has held that "impairment of physical condition" means "harm to the body that results in a reduction in one's ability to use the body or a bodily organ."⁴

5) Stevens suffered from a pinched nerve; he was treated with medication and a heating pad; and he took off work for a few days. In addition, he testified that he felt a "sharp pain" from Moye's first punch. A reasonable jury could have concluded, from this evidence, that Stevens suffered substantial pain and/or that the pinched nerve reduced his ability to use his shoulder and arm. In either event, the evidence was sufficient to support a finding of "physical injury."⁵

²See, e.g., 11 Del. C. § 612 (a) (3), (a) (4), and (a) (8).

³11 Del. C. § 222 (24).

⁴*Harris v. State*, 965 A.2d 691, 694 (Del. 2009).

⁵See: *Binaird v. State*, 967 A.2d 1256, 1261 (Del. 2009) (Testimony that abrasion was painful and that victim had to clean and wrap it sufficient to find "physical injury.").

6) Kelso testified that Moyer's kick caused a large bruise that was "quite sore" for several days. Again, the victim's testimony was sufficient to support a finding of "physical injury" based on "substantial pain."⁶

7) Simonds did not immediately realize that Moyer had bitten him. As a result, Moyer argues that Simonds could not have suffered "substantial pain." But Moyer bit Simonds during a struggle, while Simonds was pumped up with adrenaline. The bite left teeth marks and broke the skin. The jury could infer from this evidence that Simonds suffered "physical injury."⁷

8) Moyer also argues that his conviction for assaulting Stevens should be reversed because he was entitled to a self-defense jury instruction, but the trial court instructed the jury on "choice of evils" instead. The "choice of evils" defense is available when someone responds to an emergency by doing something that otherwise would be a crime, "to avoid an imminent public or private injury which is about to occur . . . through no fault of the defendant."⁸ The "self-defense" defense is available when someone uses the force he believes is necessary (short of deadly force) "for the

⁶See: *Mumitt v. State*, 2009 WL 3191709 at *3 (Del.) (Testimony that victim's buttocks were sore after a beating sufficient to find "substantial pain.").

⁷See: *McKnight v. State*, 753 A.2d 436, 437-8 (Del. 2000) ("[W]e have held that a bite on the forearm established evidence of physical injury, even when there was no suggestion that the injury caused any pain.").

⁸11 Del. C. § 463.

purpose of protecting the defendant against the use of unlawful force by the other person”⁹

9) The State tacitly concedes that the trial court gave the wrong instruction. It argues, however, that Moye waived this claim because he did not object to the instruction at trial. The State also contends that Moye suffered no prejudice because the two instructions are similar.

10) We disagree. Because Moye failed to object, we review for plain error, which is error that is “so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.”¹⁰ The trial court’s instruction must be a “correct statement of the substance of the law,” and this Court will reverse if the instructions “undermined . . . the jury’s ability to intelligently perform its duty in returning a verdict.”¹¹

(9) The trial court instructed the jury as follows:

Under Delaware law, conduct which would otherwise constitute an offense is justifiable when it is necessary as an emergency measure to avoid an imminent public or private injury “Justification” is what can also be called “self-defense.” And, what you need to consider is whether or not there was about to occur imminent public or private injury, by reason of a situation,

⁹11 *Del. C.* § 464 (a).

¹⁰*Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

¹¹*Bullock v. State*, 775 A.2d 1043, 1047 (Del. 2001) (Citations and internal quotations omitted.).

occasioned or developed through no fault of the defendant; and, two, that whatever occurred was of such gravity that according to the ordinary standards of intelligence morality, the desirability of urgency of avoiding injury to the defendant, or to the public, outweighed the desirability of avoiding the injury which eventually was caused by the defendant.¹²

(10) Moye testified that Stevens struck him for no reason and that Moye fought back in self-defense. Stevens testified that Moye punched him after Stevens demanded that Moye pay the bus fare. If the jury believed Moye, then Moye could have been acquitted under the self-defense statute. If the jury believed Stevens, Moye still could have been acquitted, because Moye could claim self-defense even if he started the fight. The need to use force in self-defense is governed by the actor's subjective belief.¹³ In the choice of evils defense, by contrast, the emergency that required force must have arisen through no fault of the actor, and the circumstances are determined by an objective standard.

(11) In sum, Moye might have been acquitted if the trial court gave the correct instruction on self-defense. It is impossible to know if the result would have been different, but we must resolve any substantial doubt in favor of Moye.¹⁴

¹²Appellant's Appendix, A-41.

¹³11 *Del. C.* § 464 (b).

¹⁴*State v. Moyer*, 387 A.2d 194, 197 (Del. 1978).

NOW, THEREFORE, IT IS ORDERED that the assault convictions involving Simonds and Kelso are hereby AFFIRMED and the assault conviction involving Stevens is hereby REVERSED. This matter is REMANDED for further action in accordance with this decision. Jurisdiction is not retained.

BY THE COURT:

/s/ Carolyn Berger
Justice